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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 877

BILL HUNNICUTT, Petitioner,

v.

UNITED STATES OF AMERICA.

Petition and Brief for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

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INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statute involved	8-14
Statement	8
Specification of errors to be urged	9
Reasons for granting the writ	11
Conclusion	13
Appendix	14

Brief in support of petition	14

CITATIONS

Braverman v. United States, 317 U. S. 49, 57 L. E. 23	16
Criminal Code, § 37, U. S. C. A. Title 18, § 88	14
Marcus et al v. United States, 20 Fed. (2d) 454	17
Short et al v. United States, 91 Fed. (2d) 614	16
United States v. Sall, 116 Fed. (2d) 745	17
U. S. Constitution, Amendment 5, U. S. C. A. Constitution, Art. 1 § 10 to Amendment 113, Paragraph 2, page 491	17
United States v. Kissell, 218 U. S. 601, 54 L. E. 1168	16

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Bill Hunnicutt prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, (R. 99).

This judgment affirmed a judgment of the District Court of the United States for the Northern District of Georgia, Gainesville Division, by which petitioner was sentenced to imprisonment for a term of two years, and to pay a fine of Ten Thousand ($10,000.00). (R. 8).

OPINION BELOW

The opinion of the Circuit Court of Appeals has not been reported in Adance Sheets, but will be found (R. 90).

JURISDICTION

The final judgment denying petition for rehearing was entered July 30th, 1945. (R. 99). The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945, U. S. C. A. Title 28 § 347.

QUESTIONS PRESENTED

Petitioner, together with Clyde Ramey, was indicted in the District Court of the United States for the Northern District of Georgia, Gainesville Division, for the offense of conspiracy. (R. 1.)

In substance the indictment charged:

Commencing on or about January 1, 1944, and continuing down to the date of the indictment November 29, 1944, defendant (petitioner) and Clyde Ramey did - - - - - combine, confederate and agree between themselves and with Claud Guest - - - - -a co-conspirator, but not indicted **and with a person or persons to the Grand Jurors unknown** to violate Title 3 § 2 (a) of the Second War Powers Act and Sugar Rationing Order No. 3 and General Ration Order No. 8 issued by the Administrator Office of Price Administration, pursuant to the provisions of the Second War Powers Act and to defraud the United States by impeding, hampering, interferring with and obstructing a lawful function of a Governmental Agency - - - in the administration of the rules and regulations promulgated under the Second War Powers Act - - - relating to the use and distribution of rationed commodities and for the purpose

of unlawfully acquiring sugar - - - the object - - - being to defeat and frustrate the orderly distribution - - - of sugar, while the United States is at war and to prevent the proper functioning of price administration in the administering of Sugar Rationing Order No. 3 and General Ration Order No. 8, and to unlawfully divert sugar into improper channels - - - - such diversion including the acquiring and acceptance of sugar in a manner not permitted by law - - - - . (R. 1 - 2 - 3.)

The indictment contained twenty-two specified overt acts. (R. 3), among them being that between February 10, 1944, and February 21, 1944, petitioner, Bill Hunnicutt, did take delivery of and have in his possession and under his control 20,000 pounds of sugar, in violation of Sugar Rationing Order No. 3.

That on or about March 15, 1944, petitioner, Bill Hunnicutt, had in his possession 2000 counterfeit No. 3 Sugar Rationing stamps acquired in violation of Sugar Rationing Order No. 3. (R. 5.)

Upon the call of the case before pleading to the merits, petitioner, Bill Hunnicutt, filed a special plea in which he set up:

That on the 13th day of November, 1944, he was indicted in the District Court of the United States for the Western District of North Carolina in the case of United States v. J. P. Aiken and others named in said indictment, not including Clyde Ramey and Claude Guest, who were named in the Georgia indictment as co-conspirators. The indictment in the North Carolina Court charged that petitioner with others named in said indictment, during the period on or about November 1, 1943, and before and since said date and up to and including the filing of said indictment (November 13, 1944), within the jurisdiction of that court, did - - - - knowingly and feloneously conspire, combine, confederate and agree together with each other

and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States of America - - - to violate Sugar Rationing Order 3, of the Second War Powers Act of 1942, with amendments thereto - - - that said defendants during said period of time **and with divers other persons whose names are to the Grand Jurors unknown** did - - - - conspire, plan, and agree to have an unlawfully possess, sell, purchase and acquire for their own use and for the use of others certain sugar ration stamps to be used in the unlawful purchase and sale of - - - - sugar - - - - and that said defendants - - - - agreed, conspired and confederated - - - - to purchase, acquire, and sell quantities of rationed sugar by the use and means of counterfeit sugar coupons, and - - - - each of them did participate in various ways to purchase, acquire and sell by wholesale and retail and otherwise place in the channels of trade for illegal consumption - - - - variouss quantities of rationed sugar by the use of counterfeit sugar coupons which had been illegally acquired.

Among the overt acts charged in the North Carolina indictment was that on or about January 1, 1944, David F. Underwood, Jr. purchased from T. G. Boyd 40,000 pounds of rationed sugar and in exchange therefor gave to said T. G. Boyd counterfeit sugar ration coupons. (R. 17).

That on or about January 1, 1944, Bill Hunnicutt, petitioner, acquired and possessed approximately 100,000 pounds of rationed sugar, for which he gave in exchange counterfeit sugar ration coupons. (R. 18).

The Government filed a response to this special plea and a motion to strike the same upon the ground that the plea showed upon its face that the evidence to support the second indictment would not have been sufficient to convict under the first. That the plea showed upon its

face that the defendants in the overt acts in the two indictments are entirely different. That in the North Carolina indictment it was charged the agreement and conspiracy was formed in North Carolina and in the Georgia indictment it was charged that the agreement and conspiracy were formed in Georgia and that all the overt acts in the Georgia indictment were committed in Georgia. The Court over-ruled the motion to strike the plea, the Government traversed the special plea and the issue was tried before jury.

Petitioner, tendered in evidence a certified copy of the North Carolina indictment with copy of the minutes of that Court indicating the proceedings had thereon.

It showed that he was adjudged guilty and fined $3,000.00 and given one year and one day imprisonment which was suspended and that he was placed on probation for two years, November 15, 1944.

The indictment in the Georgia Court (R. 1) was then introduced as evidence and petitioner was sworn and examined as to the facts. He testified without contradiction that he was the same Bill Hunnicutt indicted and sentenced in the North Carolina case.

That to the North Carolina indictment upon arraignment he entered a plea of nolo contendere and was fined $3,000.00 and given an imprisonment sentence of one year and one day which was suspended and that he was placed on probation for two years and paid the fine. (R. 20-21.)

That David F. Underwood, a conspirator, and defendant in the North Carolina indictment, was sworn and examined as a witness in North Carolina and testified that petitioner furnished him counterfeit coupons with which he purchased sugar from T. G. Boyd. (R. 21).

Petitioner testified that he bought counterfeit sugar

ration coupons at Toccoa, Georgia; that he bought the same number of sugar ration coupons at Toccoa, Georgia, which he delivered to David F. Underwood, a defendant, and a co-conspirator in the North Carolina indictment; that some of these coupons were delivered in Georgia, and that some of them were delivered in North Carolina and that David F. Underwood delivered to him (Hunnicutt) sugar at Clayton, Georgia. The understanding was when peitioner delivered the coupons to Underwood that he, Underwood, was to get sugar at Waynesville, North Carolina, and deliver the same to Hunnicutt, at Clayton, Georgia. (R. 32).

Petitioner testified that he never entered into any conspiracies, other than the one upon which he was tried and convicted in North Carolina and upon which he paid a fine of $3,000.00. (R. 21).

Upon the conclusion of the testimony the trial Judge directed the jury to sign a verdict against the special plea. Petitioner, Bill Hunnicutt, noted an exception to this ruling and this was allowed by the Court. (R. 33). The case then proceeded to trial and Clyde Ramey, the other alleged conspirator, was acquitted, petitioner was convicted and sentence to two years imprisonment and to pay a fine of $10,000.00. He appealed to the United States Circuit Court of Appeals, Fifth Circuit, and that Court affirmed the judgment of the trial Court and denied a petition for rehearing. It is this judgment petitioner seeks to have reviewed on certiorari, and reversed by this Court, and upon which he assigns error.

The questions are:

(1) Whether the indictment in the Georgia Court involved the same crime charged by the indictment in the North Carolina Court?

(2) Would the evidence necessary to convict under the

Georgia indictment have been admissible and sufficient to convict under the North Carolina indictment?

(3) Does a conspicary to violate a law of the United States permit a prosecution and punishment in more than one state where different overt acts occur in different states and by different co-conspirators?

(4) Where a person is indicted under Criminal Code § 37, U. S. C. A. Title 18, § 88, for a conspiracy, and is placed in jeopardy on such indictment, can he be again indicted and placed in jeopardy for the same conspiracy by charging different overt acts?

(5) Is the crime defined in Criminal Code § 37 - U. S. C. A. Title 18 § 88 susceptible of being made more than one crime by overt acts committed by different co-conspirators in different states.

(6) May a special plea of autrefois convict involve a mixed question of law and fact?

(7) Did the trial Court under the facts of this case commit error in directing the jury to find against the special plea and by refusing to allow the jury, under proper instructions to determine the question whether there was more than one conspiracy?

(8) Where the trial Court determined as a matter of law that the special plea was not subject to a motion to strike could a Court thereafter direct a verdict against the special plea if supported by substantial evidence?

Petitioner submits that these are questions of gravity and importance and of such a nature as will warrant the grant of the writ of certiorari to determine them and to correct the errors committed by the trial and Appellate Courts.

STATUTE INVOLVED

The pertinent provisions of Criminal Code § 37 U. S. C. A. Title 18, § 88, defining the crime of conspiring to commit offense against United States are set out in the Appendix page 14, infra.

STATEMENT

The indictment in North Carolina covered the period of time from November 1, 1943, up to and including the date of that indictment November 13, 1944. (R. 14.)

It charged that petitioner, Bill Hunnicutt, together with David F. Underwood and others therein named, "with divers other persons, whose names are to the grand jurors unknown," conspired to commit the offense specified, that is, to violate Sugar Ration Order No. 3 by obtaining and acquiring counterfeit Sugar Ration Coupons and illegally acquiring and possessing sugar. (R. 14).

One overt act was that David F. Underwood, a co-conspirator, and joint defendant in the indictment purchased from T. G. Boyd, 40,000 pounds of ration sugar and in exchange therefor gave counterfeit coupons. (R. 17). In the North Carolina Court Underwood was examined as a witness and gave evidence that he obtained these coupons from petitioner. (R. 32).

Petitioner testified that he in fact furnished to Underwood the coupons with which to purchase from T. G. Boyd the 40,000 poundss of sugar. (R. 20).

Another overt act charged in the North Carolina indictment was that on or about January 1, 1944, petitioner illegally acquired and possessed approximately 100,000 pounds of rationed sugar for which he gave in exchange counterfeit sugar ration coupons. (R. 18).

Petitioner testified that he acquired the sugar ration coupons at Toccoa, Georgia, turned them over to Underwood, some in North Carolina and some in Georgia, and that Underwood delivered to him sugar at Clayton, Georgia, and that he never entered into but one conspiracy—the one upon which he was convicted in North Carolina and paid a fine of $3,000.00. (R. 20-21).

The Circuit Court, (R. 92), stated that the Georgia indictment showed it covered a period of time in part covered by the North Carolina indictment and that in each indictment the conspiracy had to do with violating Sugar Rationing Oder No. 3. That the North Carolina indictment charged that a conspiracy took place in the Western District of North Carolina between the appellant and persons named and persons unknown and that the overt acts set forth in the indictment were allegedly committed within the same District. That the Georgia indictment charged the conspiracy took place in Georgia at divers places unknown to the jurors between the appellant and persons named and persons unknown and that the overt acts set out in the indictment were committed in Georgia. (R. 92).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding as a matter of law that the conspiracy charged in the Georgia indictment was not a continuation of the North Carolina conspiracy and that the two were separate conspiracies.

2. In holding without qualification that the evidence of David F. Underwood that petitioner furnished to him counterfeit ration coupons with which he, Underwood, purchased from T. G. Boyd 40,000 pounds of sugar and the uncontradicted evidence of petitioner to the effect

that he acquired these coupons at Toccoa, Georgia, and delivered them to Underwood, part in North Carolina, and part in Georgia, upon the understanding that he, petitioner, was to receive in exchange for said coupons sugar delivered in Georgia, was insufficient as a matter of law to authorize a jury to find that the conspiracy charged in the indictment in North Carolina and the conspiracy charge in the indictment in Georgia were one and the same.

3. In deciding and in holding that the overt acts set forth in the Georgia indictment in furtherance of the conspiracy would not have been admissible under the indictment in North Carolina, thereby deciding and holding in effect that petitioner could be twice put in jeopardy for the same conspiracy by simply changing the overt acts and the persons committing the overt acts, whereas, petitioner points out that the crime denounced by the Criminal Code § 37, U. S. C. A., Title 18, § 88, consists of a conspiracy to violate a statute and that this crime cannot be multiplied by different overt acts though committed in different states and by different persons and to so hold as a matter of law constitutes error, involving a question of great gravity and importance and one that should be reviewed and corrected by this Court.

4. In deciding and in holding that the evidence would not have warranted the jury in finding that the conspiracy charged in the two indictments was one and the same conspiracy and that petitioner had been placed in jeopardy in North Carolina for the offense upon which he was placed in jeojardy in Georgia.

5. In holding that as a matter of law the evidence was insufficient to submit the question of former jeopardy to the jury.

6. In affirming the judgment of the trial Court in directing a verdict against the special plea.

7. In holding that a jury could convict petitioner as a conspirator and find the other alleged conspirator not guilty, since the two findings are in conflict and wholly inconsistent with each other.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with Short et al v. United States, 91 Fed. (2d) 614 (C. C. A. 4), where it was held that the question raised by a plea of autrefois acquit or convict, as to identity or non-identity of persons and offense, is one of law for court, where record shows either fact on its face, but otherwise is one of fact for jury and that where prior indictment, is indefinite as to offense charged, as in case of alleged conspiracy between named defendants and others to grand jurors unknown, identity of offenses charged in such indictment and present indictment may be shown by parol.

The decision of the Court below is likewise in conflict with United States v. Bates, et al, 141 Fed. (2d) 436, (C. C. A. 7) where it was held that indictment alleging conspiracy having for its object violation of more than one law was not invalid as subjecting defendants to double jeopardy, since an indictment for conspiracy may properly aver a single conspiracy to violate one or more statutes, and proof of conspiracy to violate any one of such statutes will support a conviction and since finding of guilty as to conspiracy involves no substantive offense a judgment bars any subsequent prosecution for any conspiracy to violate any one of such statutes mentioned in indictment growing out of same facts. This decision is irreconcilable on principle with the decision of the Court below in this case. The decision of the Court below is likewise in conflict with Marcus et al v. United States, 20 Fed. (2d) 454 (C. C. A. 3) where it was held in a prosecution for a conspiracy, the government is not limited in its proof of the offense to evidence of the overt acts pleaded. In this case it was conceded by the court below that petitioner

had previously been indicted and punished for a conspiracy to violate the same statutes and rationing orders in the District Court of North Carolina covering in part the same period involved in the indictment in Georgia upon which he was tried and convicted, but the Court held that since the North Carolina indictment did not name the same defendants as were named in the Georgia indictment and alleged overt acts committed in North Carolina that proof of the same overt acts as alleged in the Georgia indictment were not admissible under the North Carolina indictment, whereas, petitioner points out that not only overt acts contained in the Georgia indictment but other overt acts not named in either indictment could have been proved under the North Carolina indictment if a part of the same conspiracy and therefore that he was placed in jeopardy in North Carolina for the same offense for which he was tried and convicted in Georgia.

The Circuit Court in the case at bar has rendered a decision, deciding an important question of law in a way untenable, since, under that decision upon which error is now assigned, it would be possible for the government to indict and try petitioner for the same conspiracy in as many cases as it could show different overt acts in different States, whereas, the crime of conspiracy as embodied in Criminal Code, § 37, P. S. C. A., Title 18, § 88, contemplates a crime against the sovereignty of the United States of America regardless of how many overt acts may be involved in the consummation of the crime of conspiracy and without regard to whether these overt acts occur in one State or in many States.

The question presented in this case is of importance in the administration of the Criminal Laws of the United States relating to the crime of conspiracy and it is of the utmost importance that this Court fix and establish a definite rule on the question as to whether an indictment for conspiracy can be obtained and a defendant convicted as often as different acts constituting an overt act in

pursuance of the conspiracy may occur in consummating the crime, whether these overt acts occur in one State where the conspiracy was formed or whether they occur in other States.

CONCLUSION

The questions raised by the decision below are of substantial public importance. The decision conflicts with the decisions of other Circuit Courts of Appeal. It decides an important question of general law in a way untenable and against the weight of authority. It is respectfully submitted that this petition for a writ of certiorari should be granted.

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